83 - 1868

No. 84-83

Office-Supreme Court, U.S.
FILED
AUG 29 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN E. WHITE,

Appellant,

v.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R. H. WARREN, Chairman, Dougherty County Board of Education; MORGAN MURPHY; CHARLES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendant, Dougherty County School System, individually and in their official capacities,

Appellees.

On Appeal From The Three Judge United States District Court For The Middle District of Georgia Albany Division

MOTION TO AFFIRM

JESSE W. WALTERS
PERRY, WALTERS & LIPPITT
409 N. Jackson St.
P.O. Box 527
Albany, Georgia 31703
(912) 432-7438
Attorney for Appellees

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-83

JOHN E. WHITE,

Appellant,

v.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R. H. WARREN, Chairman, Dougherty County Board of Education; MORGAN MURPHY; CHARLES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendant, Dougherty County School System, individually and in their official capacities,

Appellees.

On Appeal From The Three Judge United States District Court For The Middle District of Georgia Albany Division

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of The Supreme Court of the United States and the letter of the Office of the Clerk dated July 12, 1984, moves that the final judgment of the district court be affirmed on the grounds that it is clear that the Dougherty County, Georgia, Board of Education has not violated the Voting Rights Act and that in reality this is not a valid Voting Rights Act case. The question presented is insubstantial and does not warrant further argument.

STATEMENT

This is a direct appeal from the final judgment of a three judge district court specially constituted pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284 entered the 13th day of February, 1984.

It was contended by Appellant that Appellee had violated Section Five of the Voting Rights Act of 1965, 42 U.S.C. § 1973c in that the Dougherty County Board of Education had enacted or sought to administer a standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964. The district court held that Appellant did not prove his contention and therefore the Voting Rights Act had not been violated and the Appellant was not entitled to the relief sought.

Appellee generally concurs with the Statement of the Case as set forth in Appellant's Statement as to Jurisdiction. However, it should be added that Mr. White was apprised in November of 1978 that the Board expected its employees to fulfill their contracts in their entirety. Further, that Mr. White annually thereafter entered into twelve month contracts with the Board.

ARGUMENT

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE THE QUESTION PRESENTED IS NOT A SUBSTANTIAL QUESTION. IN REALITY THE QUESTION PRESENTED IS A CONTRACT QUESTION AND IS NOT A VOTING RIGHTS QUESTION.

Section 5 of the Voting Rights Act of 1954, as amended, 42 U.S.C. § 1973c is as follows:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: PROVIDED, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attor-

ney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

This case represents the second appearance of these parties before this Court. In Dougherty County Board of Education et al. vs White, 439 U.S. 32 (1978), (White 1), the first appearance of these parties, this Court held that the Board's then existing Rule 58 which mandated that a candidate for political office take leave of absence without pay from his position with the Board during candidacy and during service, if elected, violated the terms of the Voting Rights Act. However, White 1 is no authority for the preposition that the Dougherty County Board of Education has violated the Voting Rights Act in the instant case.

A history of the Dougherty County Board of Education reveals that no employee of the Board had offered for election to a political position prior to 1972 when John E.

White first offered for election to the General Assembly of Georgia. The Board had never had an occasion to consider the question of leave or no leave to serve in an elected position. In 1972, the Board considered the question for the first time and enacted Rule 58 which rule mandated leave of absence without pay during candidacy and during service.[1] In 1976, John E. White filed a Complaint in the District Court alledging that the Defendant Board of Education's Rule 58 was violative of the Voting Rights Act. The required Three Judge Court on March 27, 1977, agreed with Mr. White and enjoined the use of Rule 58 until the voting Rights Act was complied with. The Dougherty County Board of Education appealed the District Court's decision to this Court, and this Court on November 28, 1978, in a 5-4 decision affirmed the District Court White, supra. Furthermore, Rule 58 was rescinded by the Dougherty County Board of Education on April 11, 1977. The rescission of Rule 58 by the Board and the decision of this Court pertaining to Rule 58 put the Dougherty County Board of Education in the same identical position it was in on November 1, 1964, and that was; no policy, rule, standard, practice or procedure pertaining to leaves of absence for service in political positions.

On November 20, 1978, the Dougherty County Board of Education reaffirmed its position that all employees were expected to fulfill their contracts in their entirety. The Superintendent was directed to notify Mr. John White, Mrs. Lillian Parkman and Mr. Don Cutler, three

---

[1] Rule 58—POLITICAL OFFICE: Any employee of the school system as becomes a candidate for any elected political office, will be required to take a leave of absence without pay, such leave becoming effective upon the qualifying for each elective office and continuing for the duration of such political activity and during the period of service of such office if elected thereto.

employees previously elected to political office, of the Board's position. Following notification, Mr. White, Mrs. Parkman and Mr. Cutler appeared before the Board in December of 1978 specifically requesting leaves of absence for what they defined as political leaves. Leaves were granted all three parties for the years 1979 and 1980 under the proviso that a two-year study of the effect of their absences for political purposes on their job performances would be made and following such study the matter would be reassessed.

Following the grant of leaves in December, 1978, the Superintendent and his staff promulgated what they referred to as "Administrative Regulations For Unpaid Political Leave." These regulations were nothing but guidelines for the parties who had been granted leaves by the administrative staff of the school system. Under no stretch of the imagination did such regulations constitute a policy, standard, practice or procedure of the Dougherty County Board of Education.

On April 15, 1980, the Board met, and in response to further requests for leave of absence for political purposes, considered such request in the light of the study of the effect of the absences of its elected employees on their job performances, decided not to allow its employees to be absent without pay to attend to their elected offices. The study revealed that Mr. White, if granted leave, would be absent from his duties with the school system approximately one-fourth of the time.

Mr. White was rehired for the school year 1980-1981 in April of 1980 and was advised that he was expected to fulfill his contract. Notwithstanding, on November 16, 1980, Mr. White requested what he defined as a political leave. On the date of December 5, 1980, Mr. White was advised by the then president of the Board that his re-

quest had been denied and that he was expected to fulfill his contractual obligations with the Dougherty County Board of Education.

In January of 1983, Mr. White sought to have the Board adopt a policy allowing legislative leave. This request was denied and Mr. White's request for a leave of absence to serve during the 1983 Legislative Session was denied.

The record is replete with evidence that the Dougherty County Board of Education considers each and every request for leave of absence without pay on a case by case basis and does not have a policy pertaining to the granting or refusing to grant an employee a leave of absence without pay for whatever purpose.

Mr. White puts great emphasis upon the fact that the administrative staff of the Dougherty County School System, subsequent to the Board's granting leaves of absence to three elected officials in December 1978, prepared what was designated by the staff as administrative regulations for unpaid political leave. A casual reading of these regulations reveals concisely that the same do not constitute any policy of the Board of Education. The Board had granted leaves to three people and the staff was deciding: (i) whether and in what manner the three parties would keep staff advised of their whereabouts; (ii) that the three parties did not use school facilities, material, equipment and secretaries in the conduct of their political activities; and (iii) other adverse matters. White recognizes that the administrative regulations were never fully adopted by the Dougherty County Board of Education but contends that the Board should have rescinded or modified the same. Why should it be necessary for the board to rescind or modify such regulations? The Board charges the administrative staff with the duty of administering the day by day functions of the school

system. It was necessary that such regulations be put into effect and it is really immaterial whether they were promulgated by the staff or by the Board. Does the Voting Rights Act require the Board to get the approval of the Attorney General of the United States before it can prohibit their legislators from using school secretaries, school material, school supplies, school telephones and school time in connection with his legislative functions? We think not!

The question in this case is whether or not the Board has adopted a policy that explicitly and directly burdens the electoral process. The record in this case is clear that it has not. The Board lets it be known to all contract personnel that they are expected to fulfill their contracts in their entirety. Surely this does not burden the electoral process. The Board has acted upon requests for leaves of absence on an individual basis, has approved some and denied some. The fact that a request for leave of absence is related to the applicant's holding of a political office, does not ipso facto make the Board's decision denying the leave of absence in the interest of the proper administration of the school system, a rule or policy that implicitly and directly burdens the political process. White, supra, states, "Rule 58 is not a neutral personnel practice covering all forms of absenteeism. Rather, it specifically addresses the electoral process, singling out candidacy for elective office as a disabling activity." Such is not the situation here involved.

Basically, what is involved in this case is whether or not Mr. White has any obligations to honor a contract he entered into with the Dougherty County Board of Education. Mr. White had a twelve month contract which called for him to devote time and energy to the affairs of the school system. The evidence is that by being granted an unpaid leave of absence to attend to his legislative func-

tions, he was absent from his school duties approximately one-fourth of the time. It takes no crystal ball to determine that the school system can only be harmed by one of its employees being away for such a period of time. The Board considered this and in 1980, denied Mr. White's request, not because of any policy, but because of the effect his absences had upon the school system.

We have read and re-read the Voting Rights Act of 1965 and nowhere therein do we find any intimation that an employee of a covered entity has any right to demand and be granted a leave of absence to serve in an elected position. Appellant takes the position that he has an absolute right to be granted a leave of absence from his contractual position with the Dougherty County Board of Education in order to serve in an elected position. Appellant has not been denied the right to serve in his elected capacity, but he has been and is expected to honor his contract with the Board. As a matter of fact, Appellant, without being granted a leave of absence, served in the 1981, 1982 and 1983 sessions of the Georgia General Assembly.

In 1978, the Dougherty County Board of Education had three employees seeking leaves of absence for the purpose of being away from their position to serve in elected capacities. Mr. John White was a counselor at a vocational school and an elected member of the Georgia General Assembly. Mrs. Lillian Parkman was a principal at an elementary school and an elected member of the Georgia General Assembly. Mr. Don Cutler was a classroom teacher and an elected member of the Board of Commissioners of Dougherty County, Georgia. All three of the aforementioned parties had contracts with the Dougherty County Board of Education, and the Board in its wisdom granted them leaves to serve in their elected posi-

tions under the understanding that the question of leave would be reconsidered after two years' study of the effect their absences had upon the school system—a counselor being away from his duties 25% of the time; a principal of an elementary school being away from her duties at least 25% of the time; a classroom teacher being away from his duties a great portion of his time—the Board determined that such absences were not in the best interest of the school system and declined to grant Mr. White's further request for leave. Such denial was not based upon political factors but was based upon the Board's obligation to provide quality education in the community over which it had jurisdiction.

CONCLUSION

It is respectfully submitted that that majority decision of the District Court is immanently correct and no substantial question for decision by this Court is presented. Therefore, the judgment of the District Court should be affirmed.

Respectfully submitted,

JESSE W. WALTERS
PERRY, WALTERS & LIPPITT
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion to affirm has been served upon John R. Myer, 1515 Healey Building, Atlanta, Georgia 30303, counsel of record for appellant by mailing a copy of said motion to him, first class postage prepaid, addressed as above.

This 27th day of August, 1984.

Jesse W. Walters

JESSE W. WALTERS
Attorney for Appellees